IN THE

SUPREME COURT OF THE UNITED STATES

No. 61

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INDEX

Opinion Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	4
Specifications of Errors to Be Urged	5
Reasons for Granting Writ	5
Conclusion	13
Appendix—	
Judgment	A1
Order Denying Rehearing	A2

Case Cited

U. S. v. *One 1936 Model Ford V-8 DeLuxe Coach, etc.*, 307 U.S. 219, 59 S. Ct. 861	13

Statutes Cited

Section 7301 of the Internal Revenue Code of 1954	2
Section 7302 of the Internal Revenue Code of 1954	3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

A. R. ROBERSON (Claimant to One 1958 Ford Sedan, Serial No. H8AG114917),
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

A. R. Roberson, claimant to the vehicle with which this case is concerned, which vehicle is one 1958 Ford Sedan, Serial No. H8AG114917, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on October 13, 1960, and the order denying rehearing entered on November 7, 1960.

OPINION BELOW.

The District Court did not render an opinion as such, but made a Findings of Fact and Conclusions of Law, which appear at pages 160a-169a in the Appendix filed with the Main Brief on Behalf of Appellant in the United States Court of Appeals for the Sixth Circuit.

The judgment of the United States Court of Appeals for the Sixth Circuit is annexed hereto as an appendix on page A1. The order denying rehearing is annexed hereto as an appendix on page A2.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 13, 1960, and the order denying rehearing was entered on November 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED.

Did the District Court err in ordering a forfeiture of the 1958 Ford Sedan, Serial No. H8AG114917, the vehicle with which this case is concerned?

STATUTES INVOLVED.

Section 7301 of the Internal Revenue Code of 1954, insofar as applicable, provides as follows:

"*Property subject to tax*

(a) *Taxable articles*—Any property on which, or for or in respect whereof, any tax is imposed by this

title which shall be found in the possession or custody or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of such tax, or which is removed, deposited, or concealed, with intent to defraud the United States of such tax or any part thereof, may be seized, and shall be forfeited to the United States.

* * *

(c) *Equipment*—All property whatsoever, in the place or building, or any yard or enclosure, where the property described in subsection (a) or (b) is found, or which is intended to be used in the making of property described in subsection (a), with intent to defraud the United States of tax or any part thereof, on the property described in subsection (a) may also be seized, and shall be forfeited to the United States.

(d) *Packages*—All property used as a container for, or which shall have contained, property described in subsection (a) or (b) may also be seized, and shall be forfeited to the United States.

(e) *Conveyances*—Any property (including aircraft, vehicles, vessels, or draft animals) used to transport or for the deposit or concealment of property described in subsection (a) or (b), or any property used to transport or for the deposit or concealment of property which is intended to be used in the making or packaging of property described in subsection (a), may also be seized, and shall be forfeited to the United States."

Section 7302 of the Internal Revenue Code of 1954 provides as follows:

"Property used in violation of internal revenue laws

It shall be unlawful to have or possess any property intended for use in violating the provisions of the

OPINION BELOW.

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* * *

(c) *Equipment*—All property whatsoever, in the place or building, or any yard or enclosure, where the property described in subsection (a) or (b) is found, or which is intended to be used in the making of property described in subsection (a), with intent to defraud the United States of tax or any part thereof, on the property described in subsection (a) may also be seized, and shall be forfeited to the United States.

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Section 7302 of the Internal Revenue Code of 1954 provides as follows:

"Property used in violation of internal revenue laws

It shall be unlawful to have or possess any property intended for use in violating the provisions of the

internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws."

STATEMENT.

This is a proceeding *in rem* wherein the United States of America filed a libel of information against one 1958 Ford sedan, Serial No. H8AG114917, its equipment and accessories, alleging that said vehicle was subject to forfeiture for a breach of Sections 7301 and 7302 of the Internal Revenue Code of 1954. The libel of information avers that claimant-petitioner Roberson used said vehicle on *November 15, 1958*, for the transportation, deposit and concealment of 130 gallons of distilled spirits upon which the internal revenue taxes had not been paid, and that said spirits were transported, deposited and concealed with intent to defraud the United States of the tax due on said spirits.

The case was tried together with proceedings against two other vehicles, which caused confusion, and which we consider as the cause of the error committed by the United States District Court for the Eastern District of

Tennessee, Southern Division, in ordering the vehicle with which this petition is concerned forfeited; and also the error of the United States Court of Appeals for the Sixth Circuit in sustaining and affirming the United States District Court.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals for the Sixth Circuit erred in holding:

(1) It was not error for the District Court to order a forfeiture of the vehicle with which this petition is concerned.

REASONS FOR GRANTING WRIT.

We deem the question presented here to be a substantial one in that there is not one scintilla of evidence which will sustain this forfeiture. The facts will show that both the District Court and the Court of Appeals for the Sixth Circuit were utterly confused with respect to this particular vehicle because of the mass of testimony concerning the other two vehicles and this one. To allow this forfeiture to stand amounts to a taking by the United States of property without due process of law, and allows an obvious and grievous error made by both courts to stand.

The Court of Appeals for the Sixth Circuit in its statement from the bench, when this case was argued, shows that Court to have been confused as to the testimony, and an endeavor was made to succinctly point out this confusion in a petition for rehearing. The Court of Appeals for the Sixth Circuit from the bench asked government counsel if the vehicle with which this petition is concerned

was not identified by a rusted tail-light assembly, and government counsel inadvertently or mistakenly left the impression with the Court of Appeals that the vehicle had been so identified. This error is readily understandable in view of the mass of testimony pertaining to all other vehicles in the same trial.

The alleged violation with which this vehicle is charged by the libel of information is stated to have occurred on *November 15, 1958.* (Libel of Information, pp. 5a-6a Main Brief on Behalf of Appellant in the Court of Appeals for the Sixth Circuit.) We call to this Honorable Court's attention that the only evidence pertaining to the alleged violation on *November 15, 1958,* of the vehicle with which this petition is concerned is the evidence of government agent. McKnight and witness Andrews.

Agent McKnight testified as follows:

"Q. And you are not in a position to swear on your oath to his Honor here that the car sought to be forfeited here is the one that you saw?

A. I cannot. I can say only the same make, model, description, and it looks exactly like the car.

Q. Well, to get back to my question—

A. I have no—the license number on the cars was different, and *I have no identifying marks that I observed on that November 15th date, to say it was exactly the same car.*

Q. *Can you on your oath, now, and that's what I have got to go on, swear to this Court that the car sought to be forfeited here was the same one that you claim you saw there on that date?*

A. *No, I cannot.*" (Emphasis supplied).

(113a, Main Brief on Behalf of Appellant, Court of Appeals, 6th Cir.)

Witness Andrews testified, with respect to a vehicle from which he helped unload four square cans on some date in November, 1958, the exact date he did not recall, as follows:

"Q. Now, you say that you saw a man known to you as Georgia Boy parked in a new model black four-door Ford in front of the house?

A. In front of the house?

Q. Yes, sir. Is that the only way you could identify the car?

A. That's the only way I can identify it. I wouldn't know the motor number or anything about it.

Q. Well, there's a lot of black Fords in Chattanooga or were at that time?

A. It still is.

Q. And still is?

A. Yes, sir.

Q. You have seen Mr. Roberson, or Georgia Boy, as you called him, in a lot of black Fords, haven't you?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. *You can't pinpoint which one of the black Fords you have seen him in that this one was?*

A. A '58.

Q. *You have seen him in other '58's too, haven't you?*

A. *Yes, sir, '58's.*

Q. *But you can't pinpoint which black '58 Ford it was can you?*

A. *No, sir, I can't do that.*

Q. *What?*

A. *I can't do that, no, sir.*" (Emphasis supplied)
(119a-120a, Main Brief on Behalf of Appellant, Court of Appeals, 6th Cir.)

No testimony was given by either of these witnesses that there was any identifying marks such as a rusted tail-light assembly, or any other identifying marks, on the vehicle with which this petition is concerned.

The District Court and the Court of Appeals for the Sixth Circuit, and government counsel, were confused by testimony pertaining to a vehicle observed by government agent McKnight on *September 5, 1958*, and not on the date of the alleged violation of the vehicle with which this petition is concerned. Agent McKnight stated he saw petitioner driving a 1958 Ford and that "the metal around the left inside rear light of the automobile of the Roberson car, and it was corroded and rusted" (107a, Main Brief on Behalf of Appellant in the Court of Appeals for the Sixth Circuit).

The entire testimony pertaining to an automobile with a rear light corroded and rusted was as follows:

> "Mr. Ridenour: Did you see this car at that time and who was driving, and describe the car, and what you saw then?
>
> Witness McKnight: About 7:15 A.M. on *September 5, 1958*, in the Valdeau section of Hamilton County, Tennessee, I was proceeding out State Highway 8 in the government car, when I met Mr. Roberson driving a black 1958 Ford four-door sedan toward Chattanooga. He turned around and followed me back up the highway up the side of Signal Mountain. He passed me and he pulled off the road and I pulled in behind him, behind his car, and stopped and got out of the government car and walked up behind Mr. Roberson's car. At this time we carried on a conversation there at the back of the car, and during the time I observed the metal around the left inside rear light of the automobile of the Roberson car, and it was corroded and rusted. Mr. Roberson made some statement pertaining

to the metal used by the manufacturer of cars at that time.

The Court: Now, just why are you telling the Court all that? Why are you bringing it out and what relevancy does this car—

Mr. Ridenour: It is an attempt to identify the car as the one the whiskey—

The Court: *Is this the same car?*

The Witness: *It's the same model, make and description of the car.*

Mr. Badgett: He can't say it was the same car.

The Court: *September 26th*, he observed the same car, in the Valdeau section, and met Mr. Roberson driving over there, and what?

The Witness: I met him coming toward Chattanooga, and he turned around and followed me and he stopped up on the side of the mountain, and we carried on a conversation, and the only relevancy is that this car at that time, that light assembly was rusting, and after this car was seized on December the 1st or December 2nd, I examined that car, and the left rear light assembly was the same as the left rear light assembly on the car seized December 1st there, just as on *September 26th*.

Q. Well, was it the same sedan black Ford that we are talking about?

A. Black Ford four-door sedan 300 series.

Mr. Badgett: Your Honor. I want to call it to the Court's attention that he has evaded that question I asked him. A moment ago he said—he didn't say it was the same car.

By the Court:

Q. *Well, was it, Mr. McKnight? You know whether or not it was the same car or you don't.*

A. *I couldn't say positively whether it is the same car or not.*

Mr. Badgett: That's right.

The Court: Now, if you can't say, the car can't. I want you to understand that the car can't say it if these witnesses can't identify these cars. The Court can't. These people were out there and they ought to know whether these were the cars and, if they weren't, they shouldn't have seized them. They are coming in here relating a lot of details and expecting the Court to draw conclusions in them, and the Court isn't going to do that. If you can't do it, the Court isn't. Do you understand?

The Witness: Yes, sir.

The Court: We might as well understand that generally, as we go along in this case, if these people can't identify these cars in a violation of the law, then the Court can't hold these cars guilty. That kind of testimony doesn't help the Court. Instead of helping the Court, it is confusing the Court. *He says he can't say whether it is the same car or not.*

By Mr. Ridenour:

Q. Mr. McKnight, you saw a car—I believe you testified that you saw a car unloading?

A. Yes, I did.

Q. What appeared to be whiskey?

A. It unloaded 26 five-gallon square metal cans.

Mr. Badgett: Your Honor, I object to him putting words in this witness' mouth. The witness didn't say that.

By the Court:

Q. Tell me what that was, Mr. McKnight?

Mr. Badgett: I hate to be objecting. I don't want to irritate your Honor.

The Witness: On November 15th at 2:55 p.m. I saw a 1958 black Ford four-door sedan, with a spotlight on the left front and the conventional radio antenna on the right front, bearing Georgia license 1958 number 8-63, unload 26 cans at 1022 Pine Street. That's the same body, same make and model as the car on the September date and the December date. The license number wasn't the same on either occasion.

Q. Are you telling the Court that's the same sedan Ford automobile that has been libeled in this case to the best of your knowledge and belief?

A. To the best of my knowledge and belief, that is correct.

Q. All right. You saw it on what date?

A. *September 26th* was the date I saw Mr. Roberson driving the car and talked to him on the side of the road.

Q. And what date was this stuff unloaded?

A. On November 15th at 2:55 p.m., 26 cans were unloaded out of this car at 1022 Pine Street, that address.

Q. 26 cans were unloaded out of this sedan Ford car at 1022 Pine Street?

A. Yes, sir.

The Court: All right.

Mr. Badgett: Your Honor, I want to note an objection to his statement. He won't say it is the same car. He keeps making a qualified statement, to the best of my knowledge, information and belief, and that doesn't rise to the dignity of evidence. And, your Honor, in this kind of proceeding they ought to be able, as you said, to tell you whether that's the same car or not, and not have you guessing about it.

The Court: *That is correct, what you have said, the Court, I can't guess about it, and he can't guess about it; but, on the other hand, this witness could say to the best of their knowledge and belief. That objection goes to the weight and it is overruled.*

Mr. Badgett: In other words, your Honor, he is giving an opinion about it.

The Court: Well, he has given a description of the car, and I have asked him for my own satisfaction whether or not he is talking about the same car.

Mr. Badgett: I can't tell you it is.

The Court: *Well, on cross-examination you may ask him. I don't know.*

Mr. Badgett: All right.

Mr. Ridenour: You may ask him.

Mr. Mayfield: *I would like to ask him one question. I know your Honor is having a time keeping these automobiles straight.*

The Court: *I am.*

* * *

By Mr. Badgett:

Q. Now, so it will be clear, his Honor has got a terrific job to do in this case. You at no time saw the motor numbers on any of the cars you are talking about?

A. That is correct.

Q. And you are not in a position to swear on your oath to his Honor here that the car sought to be forfeited here is the one that you saw?

A. *I cannot.* I can say only the same make, model, description, and it looks exactly like the car.

Q. Well, to get back to my question—

A. I have no—the license number on the cars was different, and *I have no identifying marks that I observed on that November 15th date, to say it was exactly the same car.*

Q. *Can you on your oath, now, and that's what I have got to go on, swear to this Court that the car sought to be forfeited here was the same one that you claim you saw there on that date?*

A. *No, I cannot.*" Emphasis supplied)

(107a-112a, Main Brief on Behalf of Appellant. Court of Appeals, 6th Cir.)

From the above testimony, it is obvious that agent McKnight did not identify this vehicle on *November 15, 1958*, the date of the alleged violation, by a rusted tail-light assembly, and in fact he did not identify it at all, nor did the witness Andrews, as being the same car seized and proceeded against herein.

Forfeitures are not favored, and they should be enforced only when within both letter and spirit of the law, and the forfeiture statutes are to be strictly construed. *U. S.* v. *One 1936 Model Ford V-8 DeLuxe Coach, etc.*, 307 U.S. 219, 59 S. Ct. 861.

In this case, the government has not only failed to supply substantial evidence to support the forfeiture, but has failed to supply any evidence to support it.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM EARL BADGETT,
608 Bank of Knoxville Building,
Knoxville, Tennessee,
Counsel for Petitioner.

JUDGMENT.

October 13, 1960.

This day this cause came on to be heard upon the appeal of claimant-appellant, A. R. Roberson, from an order of the United States District Court for the Eastern District of Tennessee, Southern Division, whereby the District Judge ordered one 1958 Ford Sedan automobile, Serial No. H8AG114917 forfeited to the United States for the reason that the claimant-appellant used it on November 15, 1958, in violation of the Internal Revenue laws of the United States.

Upon consideration of this appeal and after reviewing the evidence taken in the trial court, this Court finds that the Findings of Fact of the trial judge and his conclusion that the Ford Sedan automobile was guilty as charged in the Libel of Information is correct. This Court further finds that the Findings of Fact of the District Judge are not only *not clearly erroneous* but are amply supported by the evidence.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be and it is hereby affirmed.

Approved for entry:

/s/ Lester L. Cecil,
Circuit Judge.

ORDER DENYING REHEARING.

November 7, 1960.

This day this cause came on to be heard upon the appellant's petition for rehearing.

The judgment and order of the Court in affirming the judgment of the District Court was arrived at after a careful reading of the evidence which was before the District Judge. Upon this review of the evidence the Court concluded that the findings of fact of the District Judge were not clearly erroneous.

It is therefore ordered that for the reasons stated herein and in the order of affirmance the petition for rehearing be and it is hereby denied.

/c/ Lester L. Cecil,
Circuit Judge.

COPY

FILED
FEB 27 1961
JAMES R. BROWNING, Clerk

No. 693

In the Supreme Court of the United States

OCTOBER TERM, 1960

A. R. ROBERSON, CLAIMANT TO ONE 1958 FORD SEDAN, No. H8AG114917, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	3
Conclusion	5

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OPINION BELOW

The judgment of the court of appeals (R. 176; Pet. App. 1) is reported at 282 F. 2d 772.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1960 (R. 176; Pet. App. 1). A petition for rehearing was denied on November 7, 1960 (R. 188; Pet. App. 2). The petition for a writ

of certiorari was filed on February 2, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the factual finding of the district court, in a libel proceeding, that a specific black 1958 Ford Sedan was used in the unlawful transportation of whiskey was sustained by the evidence.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Sixth Circuit (R. 176; Pet. 1), affirming the forfeiture by the District Court for the Eastern District of Tennessee of a black 1958 Ford sedan, No. H8AG114917, which the district court found had been used in the transportation of illegal whiskey (R. 167-168).

The trial also involved a 1957 Cadillac salon De Ville sedan (R. 33) and a yellow 1958 Ford Fairlane Victoria 500 model (R. 33, 38, 58), as to which the district court found the evidence insufficient. With respect to the black Ford sedan involved in the present petition the evidence may be summarized as follows:

Premises at 1022 Pine Street in Chattanooga were used in the illegal liquor business (R. 68, 75-79, 114-115). On November 15, 1958, petitioner was observed in a sedan from which some men unloaded a large number of five-gallon cans (R. 79-80, 88, 104-106, 110-111). The agents described the car as a

black, 1958 four-door Ford, with a spotlight on the left front, a radio antenna on the right front, and bearing a Georgia license No. 8-63 (R. 92, 104). One of the agents testified: "This was a series 300. It wasn't a Fairlane 500. I have seen very few of this series 300 four-doors, black" (R. 93). Agents again saw petitioner driving the car later on November 15 (R. 80-81, 106), and again on November 20 (R. 81).

Agent McKnight had seen petitioner, on September 26, driving the same car (R. 106, 108, 111; cf. R. 107). On this earlier occasion he observed that the metal around the inside rear light of the car was rusted (R. 107). This was true of the car seized on December 1—the car involved in this proceeding (R. 108).

The district judge found, as to the black 1958 Ford sedan, that "two or more of the witnesses in this record saw this black sedan automobile stop at or near 1022 Pine St., from which was taken 26 five-gallon square metal cans. [Petitioner] was in the car at that time" (R. 167). The court therefore forfeited the car. The court of appeals, in affirming the forfeiture, found that the findings of the district judge "are amply supported by the evidence" (R. 176; Pet. 1).

ARGUMENT

The sufficiency of the evidence to support the findings upheld by the two courts below—the only question raised in the petition for certiorari—presents no issue warranting review by this Court.

The claim that there was confusion as to the various automobiles is plainly unfounded. Both courts were capable of distinguishing a Cadillac from a Ford, and a yellow Ford from a black Ford. The trial judge repeatedly satisfied himself as to which incident and which car was involved in particular testimony (*e.g.*, R. 44-45, 55-56, 72-73). The testimony of each witness was generally preceded by a designation of the car being discussed (R. 47, 54, 64, 72-74, 93, 100, 103, 121; *e.g.*, "the next witness will testify as to the 1958 black Ford * * * the sedan," R. 103). The judge's findings are meticulously separated, designating each car at the outset of each group of findings (R. 160, 165, 167), and also discriminating in finding the facts as to the separate cars by denying a forfeiture as to the other two cars (R. 162, 166).

In an effort to show that there was no substantial evidence supporting the forfeiture, petitioner quotes the testimony of government agent McKnight that his identification of the car could not be absolute but could only rest on a description of the physical attributes that he observed. Petitioner overlooks the evidence of government agent Hynds, who specifically testified to the unloading of the car, noting the license number, a spotlight on the left and a radio antenna on the right, and the rarity of the series 300 four-door black type (R. 78-81, 88-89, 91-93, 100-102). There was, in addition, the fact that agent McKnight had seen Roberson in the Ford sedan on September 26, and noted rust around the rear light, a characteristic which was likewise present on the seized car.

In totality, the evidence adequately justified the conclusion that the car in question had been used to violate the internal revenue laws relating to liquor.[1]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM E. FOLEY,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

FEBRUARY 1961.

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[1] Petitioner quotes from the testimony of witness Bosh Andrews, one of the helpers who unloaded the car (Pet. 7), presumably to show Andrews' lack of knowledge as to which of petitioner's cars was used on the occasion. But his testimony was not offered for that purpose but only for his knowledge that whiskey was unloaded when petitioner had driven the car and that petitioner had warned Andrews, "don't tell other folks" (R. 114-115). Andrews' lack of capacity to testify as to anything more precise was indicated in his response to petitioner's cross-examination, "How would I know the motor number on the car? * * * I can't even remember my own name sometimes—what it's supposed to be" (R. 117). Even so, on questioning by the judge, he confirmed the testimony of the two government agents that the car driven by petitioner was a black 1958 Ford (R. 117).

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